

CFTC Gives Guidance on Cooperation

On January 19, 2017, the U.S. Commodity Futures Trading Commission ("**CFTC**") issued an Enforcement Advisory describing the factors that will be considered to evaluate the cooperation provided by companies that are the subject of CFTC investigations and / or enforcement actions (the "Cooperation Advisory"). The CFTC can, in its discretion, reduce penalties to be imposed for violations based upon its determination of a company's level of cooperation. The Cooperation Advisory emphasizes a company's proactive steps in response to an investigation, including encouraging personnel to cooperate with CFTC, identifying potential wrongdoers from within the company and from other organizations, devoting staff and resources to an investigation, and providing both documents and helpful explanations of market operations to CFTC. The Cooperation Advisory also suggests that CFTC will no longer treat joint-defense agreements as a negative factor *per se*, but will be critical of gratuitous sharing of potentially relevant documents. Finally, it suggests that CFTC may now be more interested in company policies, controls and culture, including both those that existed at the time of any misconduct, and those that the company enacts remedially.

The Cooperation Advisory replaces the CFTC's prior cooperation Enforcement Advisory, which was issued in 2007 (the "**2007 Advisory**"),¹ and sets out three broad categories of cooperation factors that CFTC will consider in evaluating a company's cooperation:

- The value of the cooperation to the CFTC's investigation or enforcement actions;
- The value of the company's cooperation to the CFTC's broader law-enforcement interests; and
- The company's culpability, culture and other related factors.

The Cooperation Advisory also enumerates factors that suggest the presence or absence of uncooperative conduct.

¹ On January 19, the CFTC also issued an Enforcement Advisory describing the factors to be considered in evaluating the cooperation by individuals who are the subjects to CFTC investigations and / or enforcement actions. This is the first Enforcement Advisory from CFTC that specifically addresses individual cooperation. Prior advisories nominally applied to individuals and companies, but listed factors that related primarily to companies.

Value of Cooperation to CFTC's Investigation

The Cooperation Advisory considers the material assistance, timeliness, nature and quality of a company's cooperation in assessing the value of cooperation provided. This section of the Cooperation Advisory expands upon the 2007 Advisory in two key respects. First, the Cooperation Advisory states that a company's efforts to encourage cooperation by its personnel will be considered, including efforts to encourage provision of testimony both to CFTC and in court during any related enforcement litigation. Second, the Cooperation Advisory lists new proactive steps for consideration, including document-preservation efforts, the devotion of adequate staff and resources to the investigation, efforts to explain and interpret transactions and other key information, and the identification of potential wrongdoers within the company and at other organizations.

Of note, the Cooperation Advisory omits a statement from the 2007 Advisory that treated the use of joint-defense agreements with employees as a negative factor. However, the Cooperation Advisory includes, as a new negative factor, the provision of data or information to a current or former employee that goes beyond what that employee would be privy to in the course of his or her employment. Taken together, these changes suggest that CFTC has elected to stop treating the use of joint-defense agreements as uncooperative *per se*—likely in an effort to facilitate greater cooperation by employees—but will react negatively to companies that use the protection afforded by such agreements to "game the system" and obtain more favorable testimony from employees.

Value of Cooperation to CFTC's Broader Law-Enforcement Interests

This is a new category of factors that was not included in the 2007 Advisory. This category lists several factors that go beyond an individual company's circumstances, such as the degree to which provision of cooperation credit will encourage cooperation from other entities, whether the subject matter of the investigation is a CFTC priority, and whether the company's cooperation helped expose an industry-wide practice. Other factors relate more directly to a company's circumstances, such as the nature and scope of the misconduct, the extent to which the company's cooperation conserves CFTC resources, and whether the misconduct involves regulated entities or fiduciaries.

Culpability, Culture and Other Relevant Factors

This category expands the list of circumstantial and remedial factors that were enumerated in the 2007 Advisory. Most importantly, this category includes greater specificity regarding remediation than the 2007 Advisory. Remedial factors to be considered include: implementation of additional internal controls, procedures and oversight—including measures intended to avoid similar but not identical misconduct in the future; whether the company took immediate steps to address the misconduct; the adequacy of steps taken against misbehaving employees and their supervisors; and the sufficiency and credibility of the company's assurances that the conduct is unlikely to recur. Relatedly, the Cooperation Advisory includes consideration of the extent to which existing company compliance policies addressed the misconduct at the time of its occurrence.

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A comparison of the Cooperation Advisory to the 2007 Advisory suggests that CFTC wants companies both to provide more robust cooperation during investigations and to improve their policies and control environments to prevent misconduct from occurring. Unfortunately, as with the 2007 Advisory, the Cooperation Advisory contains no assurance that a company providing a particular degree of cooperation will receive a particular amount of credit—or any credit—in return. Moreover, the presence of factors beyond a company's control—some of which even go beyond what a company could know or learn at the outset of an investigation—further underscores that companies will continue to find it difficult to assess the value of potential cooperation at the outset of an investigation. Despite this lack of assurance or certainty, companies that become aware of wrongdoing or otherwise become subject to a CFTC investigation are well advised to take account of the Cooperation Advisory at the beginning and throughout the process.

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